

SENATE BILL 387  
By Atchley

AN ACT to amend Tennessee Code Annotated, Title 29, to provide for prior expert consultation and for the award of attorney fees in certain civil actions alleging malpractice by design professionals.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, is amended by adding Sections 2 through 4 of this act as a new chapter thereto.

SECTION 2. For purposes of this act, "design professional" means an architect, engineer, or land surveyor lawfully practicing in this state pursuant to Tennessee Code Annotated, Title 62, Chapters 2 or 18.

SECTION 3.

(a) Except as otherwise provided herein, in any action for damages arising out of the negligence of a design professional in the practice of such design professional's profession, the plaintiff's attorney shall file a certificate in one (1) of the following alternative forms:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one (1) architect, professional engineer, landscape architect or interior designer who is licensed to practice and who practices in this state or any other state or teaches at an accredited college or university and whom the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis

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of such review and consultation that there is reasonable and substantial cause for the filing of such action;

(2) That the attorney was unable to obtain the consultation described in subdivision (1) because a statute of limitations would impair the action and that the consultation required by subdivision (1) could not be obtained before the impairment of the action. If a certificate is filed in this form, the certificate required by subdivision (1) shall be filed within sixty (60) days after filing the complaint; or

(3) That the attorney was unable to obtain the consultation described in subdivision (1) because the attorney had made three (3) separate good faith attempts with three (3) different architects, professional engineers or land surveyors to obtain such consultation and none of those contacted would agree to such a consultation.

(b) Where the plaintiff intends to rely solely on the doctrine of res ipsa loquitur or solely on a failure to inform the consequences of a procedure, or both, plaintiff's attorney need not file the certificate set forth in subsection (a) but shall instead file a certificate declaring such attorney's intentions to rely upon such theories.

(c) The certificate required by this section shall be filed at the time of filing the complaint or any amendment thereto which alleges negligence by a design professional. Where a complaint contains multiple defendants or multiple counts, the certificate shall be deemed to refer to all such defendants or counts unless the certificate declares otherwise.

(d) An attorney who falsely certifies as to matters required to be certified under this section shall be guilty of unprofessional conduct and may be proceeded against in the manner otherwise provided by law in such cases.

(e) Failure to file a certificate required by this section shall be grounds for dismissal of the action.

#### SECTION 4.

(a) In any action for damages arising out of the negligence of a design professional, the court upon a finding that the action is frivolous or vexatious or is barred by the provisions of a statute of limitations, may award reasonable attorneys' fees incurred in the defense of such action to any person accused of such negligence who was dismissed from the suit, if such dismissal was not part of a settlement, or to any such person who did not have a civil judgment rendered against him, upon motion in the cause and in accordance with this section.

(b) When the court determines that a person is entitled to reasonable attorneys' fees under this act, it shall allocate the payment thereof among the parties as it deems most just and may charge such amount or portion thereof to any party, including a plaintiff, whether or not there was a civil judgment rendered against such party.

(c) Before, or at the time the court makes allocation of attorneys' fees, the court shall exercise its discretion in determining whether attorneys' fees are to be awarded and as to the amount thereof so that manifest injustice may be avoided. Findings in support of an award shall be specifically stated in the judgment or order of court. The following factors among others shall be taken into consideration in making such determinations:

(1) The extent of any efforts made to determine the truth of an adverse claim before making such claim or during pretrial proceedings, including whether any pretrial investigation or examination has been done, or expert opinion sought;

(2) The extent of discovery proceedings conducted, including any interrogatories or depositions taken;

(3) In the case of a person entitled to attorneys' fees, the extent to which he has made available facts to indicate his nonliability for any money damages;

(4) The financial conditions of the parties;

(5) The nature and extent of the claim, and whether any new or novel issues or theories of law are advanced by the plaintiff; and

(6) That a party has prosecuted or defended the case in bad faith or abused the procedure set forth in the Tennessee Rules of Civil Procedure.

(d) If, on appeal, the appellate court determines that a party is entitled to reasonable attorneys' fees for any stage of proceedings prior to appellate proceedings, then, whether or not the amount of any such fees awarded is modified on appeal, that party shall also be entitled to reasonable attorneys' fees for the appellate proceedings. If the case is remanded for further proceedings, an award of attorneys' fees shall be made to any person so entitled under this act upon a final determination by the court to which the case was remanded.

SECTION 5. This act shall take effect upon becoming law, the public welfare requiring it.